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In The
Supreme Court of the United States

SPLENDID SHIPPING SENDIRIAN BERHAD AND M/V HARMONY CONTAINER, IN REM,

Petitioners,

v.

TRANS-TEC ASIA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF MALAYSIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b) of the Rules of this Court, Malaysia requests leave to file the accompanying *amicus curiae* brief. This brief is submitted in support of the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Petitioners, Splendid Shipping Sendirian Berhad and M/V Harmony Container, in rem, consent to the filing of this brief, and a copy of counsel's letter is being lodged with the Court. Respondent, Trans-Tec Asia, does not consent. Counsel of record for both petitioner and respondent received timely notice of Malaysia's intent to file a brief *amicus curiae*.

Malaysia, as an independent, sovereign state, is interested in this matter because the Ninth Circuit's decision below has interfered and will in the future interfere with the implementation of Malaysian maritime law. Malaysia, as a continental and insular state with numerous offshore islands, is very interested in international maritime trade. Its maritime law is identical with the law of the United Kingdom. That well-developed maritime law would not have allowed a third party to impose a lien against a ship for the supply of bunkers or other "necessaries" for the ship. The extraterritorial imposition of U.S. lien law in this case against a Malaysian shipowner's Malaysian flag ship for bunkers supplied by a Singapore company to a Taiwanese charterer of the ship in

Korea will have serious repercussions in Malaysian foreign trade by sea.

Malaysia needs a decision by this Court both to unify the law within the United States, and to let Malaysia and other nations know whether the U.S. courts will apply U.S. lien law extraterritorially to create a lien in a foreign country against a foreign ship that could be enforced in the United States.

Malaysia respectfully moves this Court for leave to file the accompanying *amicus curiae* brief.

October 27, 2008

Respectfully submitted,

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INTEREST OF THE *AMICUS CURIAE*[1]

Malaysia, an independent, sovereign nation, ranking amongst the top twenty-five shipowning nations, realizes that the extraterritorial application of U.S. maritime lien law interferes with Malaysia's maritime law. Malaysia's maritime law is identical to the United Kingdom's well-developed maritime law. Only a small portion of maritime nations, one of which is the United States, would grant a party that furnished "necessaries"[2] to a ship an in rem lien against the ship. William Tetley, *Maritime Liens and Claims* 551 (2d ed. 1998); *Trans-Tec Asia v. M/V Harmony Container*, 518 F.3d 1120, 1123 (9th Cir. 2008) (Pet. App. 7). Most of the world's maritime nations would not grant a lien.

If a Malaysian shipowner charters its Malaysian-flag ship, the Malaysian shipowner should be able to rest assured that its ship will not be arrested in the United States to pay for bunkers[3] purchased in a transaction having no substantial connection to the United States, particularly when the charterparty did not allow the charterer to create liens. If such a risk

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. No counsel for any party authored this brief in whole or in part, and no person other than the amicus curiae represented in this brief made any monetary contribution to its preparation or submission.

[2] The term "necessaries" includes supplies to a ship, 46 U.S.C. §§ 31301(4), 31342.

[3] The term "bunker" or "bunkers" refers to ship's fuel.

were to exist, a shipowner would charge higher charter hire for ships that will call at a U.S. port. The higher charter hire would of course increase the cost of trade with the United States. The Federal Maritime Lien Act ("FMLA"), 46 U.S.C. § 31301, *et seq.* would give a supplier of bunkers or other "necessaries" furnished in the United States a lien against the ship to which they were furnished. If a transaction having no substantial connection to the United States similarly created a U.S. lien, it would conflict with the maritime law of Malaysia and most of the world.

Under the current status of U.S. law, all courts of the United States would not apply U.S. lien law extraterritorially. The Fifth and Ninth Circuits may apply the lien law extraterritorially, but the First, Second, and Eleventh Circuits would not.

A decision from this Court is necessary to let Malaysia and other nations know (1) that the treatment of extraterritorial liens will be treated uniformly within the United States, and (2) whether the United States will impose extraterritorial liens at all upon wholly foreign transactions.

SUMMARY OF ARGUMENT

The Ninth Circuit decision in this case, as well as decisions in the Fifth Circuit, interfere with the law of Malaysia, while decisions in the First, Second, and Eleventh Circuit do not interfere with Malaysian law.

The interference with Malaysian law would require Malaysian shipowners as well as shipowners from most maritime nations to take measures to protect themselves against unpredictable liens that a U.S. court might decide were formed outside the United States when ships' necessaries were purchased outside the United States pursuant to contracts with no U.S. connection. Shipowners would probably protect themselves by charging extra charter hire, thus increasing the cost of trading with the United States.

ARGUMENT

I. THE DECISION OF THE NINTH CIRCUIT IN THIS CASE WOULD SERIOUSLY INTERFERE WITH MALAYSIA'S MARITIME LAW.

Under the Ninth Circuit's decision below, a Malaysian shipowner cannot determine whether a U.S. court would impose a U.S. lien on a Malaysian ship owned by a Malaysian company for bunkers supplied outside the United States by a non-U.S. company. The decision may prevent a Malaysian shipowner from relying on predictable Malaysian law despite the clear terms of the Malaysian shipowner's charterparty.

The Malaysian company, petitioner Splendid Shipping Sendirian Berhad ("Splendid") owned a Malaysian flag vessel, petitioner *M/V Harmony Container*, and time chartered her to Kien Hung Shipping Company ("Kien Hung"), a Taiwanese corporation on

the commonly used Produce Exchange Form of Time Charterparty. This charterparty specified that the charterer could not create liens against the vessel. *Trans-Tec Asia*, 518 F.3d at 1129 (Pet. App. 21). The charterer contracted with Trans-Tec to furnish bunkers in Korea. This bunker supply contract incorporated the terms of another contract. That contract, contrary to the provision of the charterparty signed in Malaysia, provided that the law of the United States or the state of Florida would govern and that furnishing the bunkers would create a lien against the vessel in rem. The charterer became insolvent and the bunker supplier proceeded against the vessel in rem when she was in the Port of Los Angeles a year later. Security was provided so as not to delay the vessel and this lawsuit ensued. The United States District Court for the Central District of California properly denied the lien in favor of a foreign supplier of necessaries furnished in a foreign port. The matter was appealed to the United States Court of Appeals for the Ninth Circuit, which reversed the district court and imposed the lien.

Malaysia's law would not encourage suppliers of bunkers and other necessary items to extend credit to parties unworthy of that credit. Malaysia's law would not allow the bunker supplier to sue the ship in rem for debts that were not incurred by the ship's owner or demise charterer. If the bunker supplier wanted to ensure that it would be paid for the bunkers, it could require payment before the bunkers were supplied, or

it would have to examine the credit worthiness of the parties, such as the charterer in this case, before extending credit to them. If the U.S. maritime lien law were not applied extraterritorially to create a lien for bunkers supplied via a Singapore company to a Taiwanese charterer in a Korean port, a shipowner would only need to be concerned about the U.S. maritime liens if its ship received bunkers or other necessaries in a U.S. port or from a U.S. supplier.

It is common for the time charterer of a ship to own and purchase the bunkers on board the ship. When a ship begins a time charter, the time charterer purchases the bunkers then on board the ship at the price of the bunkers at that time. When the ship is re-delivered by the time charterer to the owner, the owner purchases the bunkers remaining on board the ship at the price for bunkers at that time. The time charterer purchases the bunkers as required during the voyages.

If a ship were scheduled to call at a U.S. port and the owner feared that the charterer might order bunkers at the U.S. port and not pay for them, the owner could insist in the charterparty that the owner would arrange for the purchase of bunkers and other necessaries in the United States. In that way, the owner could make sure that the bunkers were paid for and that it would not be exposed to liens against the ship long after the charterparty had ended.

If U.S. law is to be applied extraterritorially, shipowners could not avoid the imposition of liens against their ships for bunkers and other necessaries supplied by foreign suppliers anywhere in the world. These liens could be executed against the ship as they were in this case, long after the ship was re-delivered by the charterer and even after the charterer had become bankrupt.

A decision by this Court is necessary to let foreign shipowners know whether their ships might be subject to U.S. liens caused by extraterritorial extension of U.S. law to wholly foreign transactions. This Court's decision will, of course, unify the law within the United States and thereby give shipowners certainty and predictability in the contracts they enter.

II. THE CONFLICT AMONG CIRCUITS CREATES INTOLERABLE UNCERTAINTY IN MARITIME LAW FOR MALAYSIA AND THE INTERNATIONAL MARITIME COMMUNITY.

Malaysia has a strong interest in the uniform and predictable application of its laws and policies regarding maritime liens. The Ninth Circuit's decision confirms a split among the circuits and creates further disharmony in the law of the United States on maritime liens. In its decision, the Ninth Circuit even recognized that there was a "tension" in existing circuit court opinions on the reach of the FMLA. *Trans-Tec Asia*, 518 F.3d at 1127. (Pet. App. 15).

The Ninth Circuit enforced a U.S. choice-of-law clause, allowing a foreign bunker supplier to enforce a lien against a foreign-flagged vessel for bunkers supplied to the vessel by a charterer in a non-U.S. port. The Fifth Circuit has also allowed parties to a maritime lien transaction to create a maritime lien by contract, by using a choice-of-law clause to create a lien when it otherwise would not arise. *Liverpool & London S.S. Protection & Indemnity Association v. Queen of Leman MV*, 296 F.3d 350, 353 (5th Cir. 2002). In *Queen of Leman*, the court held that an insurer could enforce a maritime lien for necessaries under U.S. law even though the contract otherwise called for the general application of English law, which does not allow for maritime liens for necessaries. 296 F.3d at 355.

The Ninth and Fifth Circuit opinions conflict directly with the rulings of three other maritime circuits that have considered the reach of the FMLA Clause. The First and Eleventh Circuits limit the FMLA to protect only U.S. suppliers. *See Tramp Oil & Marine Ltd. v. M/V Mermaid I*, 805 F.2d 42 (1st Cir. 1986); *Trinidad Foundry & Fabricating Ltd. v. M/V K.A.S. Camilla*, 966 F.2d 613 (11th Cir. 1992). In *Tramp Oil & Marine*, a Danish charterer ordered bunker fuel from an English fuel broker which arranged for a U.S. company to supply the fuel in the port of Savannah, Georgia. 805 F.2d at 44. The court held that the fuel broker was not entitled to a maritime lien against the vessel and declined to extend the FMLA to cover the foreign brokers, as the Act was

intended to benefit only U.S. suppliers. *Id.* at 46. Similarly, in *Trinidad Foundry & Fabricating Ltd.*, 966 F.2d 613, the court followed Congress's intent to limit the reach of the FMLA to U.S. suppliers. In *Trinidad Foundry,* the parties to a repair contract chose English law. A foreign repairman, who made certain repairs and provided other "necessaries" to the vessel in Trinidad, arrested the vessel in Florida and filed an in rem claim under English law and a claim for a maritime lien under the FMLA. 966 F.2d at 616-17. The court held that the in rem claim failed because maritime liens for necessaries are not recognized under English law. The court in the alternative held that the FMLA does not provide for maritime liens for goods and services supplied by a foreign plaintiff to foreign flag vessels in foreign ports. *Id.* at 617.

The Second Circuit allows creation of a U.S. maritime lien only when the FMLA is applicable under a proper choice-of-law analysis. *Rainbow Line v. M/V Tequila*, 480 F.2d 1024 (2d Cir. 1973). In *Rainbow Line*, a charterer asserted a maritime lien in an attempt to gain priority status over a ship's mortgagee. The court held that even though the contract had a U.S. choice-of-law provision it was not valid because maritime liens do not arise from the agreement of the parties. 480 F.2d at 1026. The court applied a choice-of-law analysis under this Court's seminal decision in *Lauritzen v. Larsen*, 345 U.S. 571 (1953). *See* 480 F.2d at 1026. The *Lauritzen* analysis pointed to U.S. law, and the charterer was able to obtain its lien under the FMLA. In this case, both

lower courts specifically held that under a *Lauritzen* analysis, Malaysia had the greatest interest in having its law applied and that no lien would be enforced in Malaysia in accordance with well-established Malaysian law.

The Ninth Circuit's decision in this case, therefore, confirms the persistence of a circuit split over the extraterritorial extension of maritime liens under the FMLA to foreign suppliers in wholly foreign transactions. That split produces substantial uncertainty for Malaysia and other maritime nations, because the Malaysian maritime community now faces many different legal standards. In most of the world, Malaysia's own legal standard is upheld. In the United States, however, the standard varies depending on the geographic region. In the waters of the Ninth and Fifth Circuits, Malaysian parties will potentially be subject to U.S. maritime liens if the supplier simply includes the right kind of provision in its contract – in direct conflict with the laws and policies of Malaysia (and almost every other maritime nation). In the other circuits that comprise a large portion of the navigable waters of the United States, the parties would not be permitted to create maritime liens by contract. This disuniformity imposes shifting and unpredictable standards on a foreign sovereign based on the geographic region of the U.S. port.

The law of the U.S. circuits regarding maritime liens is now in disharmony creating unpredictable results. The discrepancy frustrates efforts by Malaysia and other maritime nations to develop and implement

consistent maritime law policies. Malaysia believes this Court should grant *certiorari* to resolve this conflict and avoid the undesirable and unpredictable consequences that arise from it.

III. THE DECISION OF THE NINTH CIRCUIT IN THIS CASE WOULD PREJUDICE THE INTERESTS OF MALAYSIAN SHIPOWNERS, BONA FIDE PURCHASERS, MORTGAGEES AND OTHER HOLDERS OF MARITIME LIENS AND RIGHTS IN REM.

Malaysia, as an international maritime nation, has a strong interest in preventing the extension of the internal laws of one country to Malaysian-owned vessels to the prejudice of Malaysian shipowners in a transaction having absolutely no connection to the United States. Thus, the decision of the Ninth Circuit effectively produces a position that there is no requirement for a linkage to be made to any United States party (such as a supplier) in order for the Federal Maritime Lien Act to be applied to a foreign party, a position which has a very far-reaching implication. In this case, petitioner Splendid has done everything possible in its agreement with its charterer, Kien Hung, to ensure that the latter did not create any liens on the vessel.

In addition, Malaysia must be assured of the protection accorded to Malaysian shipowners from finding themselves in the identical position as Splendid where their chartered (or formerly chartered) vessels are arrested in a United States port, detained, prevented from leaving, or required to post security

during the pendency of litigation in United States courts while third-party suppliers with which the Malaysian shipowners have had no relation whatsoever dispute whether the vessel will be sold to pay debts incurred by charterers in wholly foreign transactions, a position that is a clear prejudice to Malaysian shipowners, bona fide purchasers, mortgagees and other holders of maritime liens and rights in rem.

The decision of the Ninth Circuit abrogates the rights and protection of Malaysian shipowners under Malaysian law from being subjected to maritime liens by agreement of third parties and creates a powerful right not available under Malaysian law. Malaysia has an important interest in not having the rights of Malaysian shipowners under Malaysian law and under charterparties entered into by Malaysia shipowners unilaterally abrogated by a third-party supplier whose sole purpose is to acquire a powerful United States maritime lien not available under the law of Malaysia. Malaysia requires certainty and clarity in the law as to whether a maritime lien may be created indirectly through a choice-of-law provision when it may not be created directly by agreement to the prejudice of third parties including Malaysian vessel owners, mortgagees, and other creditors.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: October 27, 2008

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